In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-137

K. C. WU, PETITIONER

v.

NATIONAL ENDOWMENT FOR THE HUMANITIES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. Petitioner applied to the National Endowment for the Humanities (the "Endowment") for a grant to write a comprehensive history of China. Under Endowment procedures, the application was referred to five American professors of Chinese history for evaluation.[1] Four professors submitted written re-

[1] These professors work as unpaid consultants to the Endowment "as a public service for the good of the humanities" (Pet. App. A 31). The Endowment has a strong interest in retaining such services (Pet. App. A. 36).

views, and the fifth submitted an oral review, all recommending against the application. After receiving these and other evaluations, the Endowment rejected petitioner's grant application (Pet. App. A 29-30).

Petitioner then instituted this action under the Freedom of Information Act, 5 U.S.C. 552, in the United States District Court for the Southern District of Georgia, seeking from the Endowment records, or portions of records, which contain (1) refutations by the five experts of petitioner's criticism of Western scholarship in the field of Chinese studies, and (2) all facts or evidence given by these experts to the Endowment in support of their opinion that petitioner's training is inadequate for the task outlined in his application (Pet. App. A 31). The district court granted the Endowment's motion for summary judgment, concluding that the documents are covered by Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5), which exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party * * * in litigation with the agency" (Pet. App. B 37, 40). The court of appeals affirmed (Pet. App. A).

2. The decision below is correct and presents no questions warranting further review.

The court of appeals correctly concluded (Pet. App. A 32) that the documents constitute intra-agency memoranda within the meaning of Exemption 5. The government often needs the opinions of temporary

consultants, who should be able to give their opinions freely and without fear of publicity in the same manner as agency employees, see *Soucie* v. *David*, 448 F. 2d. 1067, 1078, n. 44 (C.A. D.C.), and Congress has specifically empowered the Endowment to utilize the services of such consultants, 20 U.S.C. 959(a)(4).

Exemption 5 protects the government "against having to reveal those internal working papers in which opinions are expressed and policies formulated and recommended," *Ackerly* v. *Ley*, 420 F. 2d 1336, 1341 (C.A. D.C.). It reflects the policies of "encouraging full and candid intra-agency discussion, and shielding from disclosure the mental processes of executive and administrative officers," *International Paper Co.* v. *Federal Power Commission*, 438 F. 2d 1349, 1358-1359 (C.A. 2). The rationale of Exemption 5 is fully applicable here. As the court below noted (Pet. App. A 36), the candid views of scholars concerning grant applications could not be obtained if their comments were subject to disclosure to the applicant.

Intra-agency documents are protected by Exemption 5 unless they are of a kind which would "routinely be disclosed to a private party through the discovery process," H. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966); *Sterling Drug Inc.* v. *Federal Trade Commission*, 450 F. 2d. 698, 705 (C.A. D.C.). As the court of appeals stated, the documents sought here—letters or other memoranda commenting on the merits of petitioner's grant application—"are not factual

* * * reports but recommendations containing * * * opinions * * *" (Pet. App. A 34). As such, these documents constitute internal working papers which would not routinely be disclosed in litigation and they therefore are within Exemption 5. Since the documents are only expressions of opinion concerning the value of a proposed academic project and do not constitute or include factual reports, this case does not present the issue before this Court in *Environmental Protection Agency* v. *Mink*, No. 71-909.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

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